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### Public Trial - Exclusion of the Press and Public

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sued by his spouse is entitled to reimbursement from his insurer.<sup>12</sup> Conversely, the presence of such a clause effectively bars recovery.<sup>13</sup>

Since Pennsylvania requires contribution between negligent joint tortfeasors and thus would ordinarily allow the Railroad Company to enforce contribution against the husband, the further question of whether the non-liability clause should prevent the enforcement of contribution against the husband's insurer is squarely posed. The manifest purpose of such a clause is to discourage fraudulent and collusive law suits.<sup>14</sup> It is at once apparent that this danger is in no way lessened merely because the negligent joint tortfeasor rather than the insured is seeking to recover from the insurer. Since the exclusion clause will prevent the husband from obtaining payment directly from the insurer, it should be equally effective to prevent a joint tortfeasor from indirectly obtaining such payment through enforcement of contribution. If, in the instant case, the insurer has been compelled to indemnify the joint tortfeasor, the indemnification would, for all practical purposes, have constituted payment to the insured's wife. It is submitted that this result would be undesirable as making the insurance policy applicable in contradiction of its express terms.

WALTER AURAN

**PUBLIC TRIAL — EXCLUSION OF THE PRESS AND PUBLIC** — The defendant was accused of compulsory prostitution. The trial judge, shortly after the start of the trial, on his own motion and over the defendant's objection, made an order excluding the general public and press from the court room. Friends and relatives of the defendant were allowed to remain. On appeal it was *held*, that allowing only the friends and relatives of the accused to remain in the court room did not satisfy the statutory<sup>1</sup> requirement of a public trial. A statute providing for exclusion of the public from trials involving certain sordid crimes<sup>2</sup> must be strictly construed. The mere anticipation of the introduction of obscene or indecent evidence is not sufficient justification for excluding the public from trials for offenses not specifically designated in the statute. *People v. Jelke*, 123 N.E.2d 769 (N.Y. 1954).

Pennsylvania was the first state to grant the accused the common law right

12. *Roberts v. United States Fidelity and Guaranty Co.*, 188 N.C. 795, 125 S.E. 611 (1924); *cf. Lasecki v. Kabara*, 235 Wis. 645, 294 N.W. 33 (1940).

13. *Morris v. State Farm Mut. Auto Ins. Co.*, 88 Ga.App. 844, 78 S.E.2d 354 (1953); *Indemnity Ins. Co. of North America v. Geist*, 270 Mich. 510, 259 N.W. 143 (1935); *Tomlyanovich v. Tomlyanovich*, 239 Minn. 250, 58 N.W.2d 855 (1953); *Sibothan v. Neubert*, 168 S.W.2d 981 (Mo. 1943).

New York, by statute, permits spouses to sue each other but removes the incentive by preventing collection from an insurer even in the absence of a non-liability clause in the insurance policy. Insurance Law §109 Subd. 3-a.

14. *See, State Farm Mut. Auto Ins. Co. v. James*, 80 F.2d 802, 803, 804 (4th Cir. 1936); *Tomlyanovich v. Tomlyanovich*, *Supra* Note 13 at 58 N.W.2d 864; *Cartier v. Cartier*, 84 N. H. 526, 528, 153 Atl. 6, 7 (1931).

1. N. Y. Code of Criminal Procedure §8 "In a criminal action, the defendant is entitled: 1. To a speedy and public trial . . ."; N. Y. Civil Rights Law §12 "In all criminal prosecution, the accused has the right to a speedy and public trial . . ."

2. N. Y. Judiciary Law §4 "The sittings of every court within this state shall be public and every citizen may freely attend the same, except that in all proceedings and trials in cases for divorce, seduction, abortion, rape, assault with intent to commit rape, sodomy, bastardy and filiation, the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses, and officers of the court."

of a public trial in a criminal case.<sup>3</sup> Subsequent to ratification of the Sixth Amendment to the Federal Constitution,<sup>4</sup> most states<sup>5</sup> have provided for this right by constitutional provision,<sup>6</sup> statute,<sup>7</sup> or judicial decision.<sup>8</sup>

A public trial obviously is not one held in complete secrecy, although unrestricted admittance of any member of the public wishing to attend need not be permitted. It is recognized that the preservation of order in the court room or the protection of the public morals may justify the exclusion of part or all of the general public.<sup>9</sup> Limiting the number of spectators in the interest of health or for sanitary reasons,<sup>10</sup> excluding young people in cases involving morals and public decency,<sup>11</sup> or temporarily excluding spectators where necessary to enable an immature or emotionally disturbed witness to testify,<sup>12</sup> is not a violation of the defendant's right.

Perhaps the most persuasive argument in support of indiscriminate admission of spectators is that contemporaneous review in the forum of public opinion serves as an effective restraint on any possible abuse of judicial discretion.<sup>13</sup> There can however, be little question but that public policy opposes widespread disclosure of evidence tending to adversely affect public morals. Whether such disclosure may be prevented by excluding the public, or even a part of the public from a criminal trial is a fertile ground for dispute.<sup>14</sup>

A North Dakota case<sup>15</sup> involving a rape of a female under the age of fourteen years held that the accused's constitutional and statutory right to a "speedy and public trial" had not been abridged by exclusion of all persons not having a bona fide interest in the proceedings. A contrary view has been taken by an Oregon court.<sup>16</sup>

It is submitted that protection of public morality amply justifies granting a trial judge discretionary power to bar the press and at least a limited class of spectators from trials concerned with crimes of an unusually sensational nature. Although abuse of this discretion would amount to a regressive step

3. Pa. Const., Declaration of Rights IX (1776) as cited in *In re Oliver* 333 U. S. 266, 267 (1948).

4. U. S. Const. Amend. VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ."

5. Massachusetts, New Hampshire, Virginia, and Wyoming, do not have provision for public trial. See *In re Oliver*, *supra* note 3 at 267.

6. E.g., N. D. Const., Art. I §13 "In criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and public trial; . . ."

7. E.g., N. D. Rev. Code §29-0106 (1943); N. Y. Code of Criminal Procedure §8.

8. See *Dutton v. State*, 123 Md. 373, 91 Atl. 417, 422 (1914).

9. *Reagan v. United States*, 202 Fed. 488 (9th Cir. 1913).

10. *People v. Miller*, 257 N. Y. 54, 60, 177 N.E. 306 (1931).

11. See, *State v. Hensley*, 75 Ohio St. 255, 265, 79 N.E. 462, 463 (1906).

12. *Hogan v. State*, 191 Ark. 437, 86 S.W.2d 931 (1935).

13. See *In re Oliver*, *supra* note 3 at 270; Also, publicity given a trial may bring forth witnesses not known to exist to the parties, *Tanksley v. United States* 145 F.2d 58 (9th Cir. 1948), and the witness may be less apt to perjure himself if he knows that the public will hear or later read his testimony, 6 Wigmore, Evidence §1834 (3d ed. 1940).

14. Judge Desmond, in the dissenting opinion of the instant case, questioned the logic that spectators may be dismissed because the court room air is physically polluted but stated that moral pollution can never be prevented by the judge. Compare *Davis v. United States*, 247 Fed. 394 (8th Cir. 1917) with *People v. Hall*, 51 App. Div. 57, 64 N. Y. Supp. 433 (1900).

15. *State v. Nyhus*, 19 N. D. 326, 124 N.W. 71 (1909).

16. *State v. Osborne*, 54 Ore. 298, 103 Pac. 62 (1909).

toward Star Chamber<sup>17</sup> proceedings, review on appeal should render unlikely such an eventuality.

LYLE E. BALL

**TORTS — WRONGFUL DEATH STATUTE — SURVIVAL OF CAUSE OF ACTION UPON DEATH OF BENEFICIARY** — Action was brought by the Administrator of the estate of Julia Dianiska who was killed by the defendant's train. Prior to the trial the decedent's only living next of kin who sustained pecuniary damages died. On appeal the court *held*, that as there remained no living beneficiary who suffered pecuniary injury as a result of the death of Julia Dianiska and as the cause of action is not such species of property as will pass to the heirs or next of kin of those to whom the right is given,<sup>1</sup> the action could not be maintained. *Danis v. New York Central Ry.*, 160 Ohio St. 474, 117 N.E.2d. 39 (1954).

At common law no action lay for the death of a human being caused by negligent or wrongful act of another,<sup>2</sup> regardless of the relationship between the deceased and the beneficiary and of the financial loss occasioned by the death.<sup>3</sup> This rule was originally supported by the doctrine that when death resulted, the civil remedy was merged in 'the public offense.'<sup>4</sup> It was said to be inconsistent with the policy of law to permit the value of human life to become the subject of litigation.<sup>5</sup> Lord Ellenborough's opinion in the case of *Baker v. Bolton*,<sup>6</sup> seems to be the primary authority supporting the rule. In reference to the case Prosser says, "Lord Ellenborough, whose forte was never common sense, held without citing any authority and declaring in broad terms that, 'in a Civil Court the death of a human being could not be complained of as an injury.'"<sup>7</sup> The holding, which was criticized in both England<sup>8</sup> and the United States,<sup>9</sup> was nullified in England by passage of the Fatal Accidents Act of 1846,<sup>10</sup> better known as Lord Campbell's Act. Today, every American state has a remedy for wrongful death, most of which were modeled after Lord Campbell's Act.<sup>11</sup>

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17. Smith & Zurcher, Dictionary of American Politics (1944) p. 291 "A secret proceeding in which a person whose interests are affected is given inadequate or no opportunity to present his case, and in which the proceedings are conducted and conclusions reached in derogation of usual forms. The name is derived from the Star Chamber, an ancient court abolished by Parliament in 1641 which had no jury and was permitted to apply torture."

1. Ohio Rev. Code §2125.02 provides: "that the action shall be brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving spouse, the children, and other surviving next to kin of the decedent who have suffered pecuniary injury as a result of such death."

2. See *Aetna Life Ins. Co. v. Moses*, 287 U. S. 530, 539 (1932); *Kelliher v. New York Central & Hudson River Ry.*, 212 N. Y. 207, 105 N.E. 824 (1914).

3. *Mobile Life Ins. Co. v. Brame*, 95 U. S. 754 (1877); *Tullgren v. Amoskeag Mfg. Co.*, 82 N. H. 268, 133 Atl. 4 (1926) (husband and wife).

4. See *Louisville & Nashville Ry. v. McElwain*, 98 Ky. 700, 34 S.W. 236, 237 (1896).

5. See *Phillip v. Northern Pacific Ry.*, 46 Wash. 173, 89 Pac. 468, 470 (1907).

6. 1 Camp 493, 170 Eng. Rep. 1033, (1808).

7. Prosser, Torts 955 (1941).

8. See *Osborne v. Gillett*, L. R. 8, Exch. 88 (1873) *passim*; *Clark v. London General Omnibus Co.*, 2 K.B. 648 (1906) *passim*.

9. See *West v. Boston & Maine Ry.*, 81 N. H. 522, 129 Atl. 768, 770 (1925); *Rowe v. Richards*, 35 S. D. 201, 151 N. W. 1001, 1003 (1915).

10. 9 & 10 Vict., c. 93.

11. Prosser, Torts 955 (1941).